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RECORD OF ORAL HEARING
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte GREGORY ASHTON, EIRO FUKUDA,
and MASAHARU NISHIKAWA

Appeal 2009-001802
Application 10/824,122
Technology Center 3700

Oral Hearing Held: June 11, 2009

Before TONI R. SCHEINER, ERIC B. GRIMES, and
DONALD E. ADAMS, *Administrative Patent Judges*.

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

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PROCEEDINGS

1 MS. BEAN: Calendar No. 34, Mr. Ware.

2 JUDGE SCHEINER: Thank you. Good morning.

3 MR. WARE: Good morning, Your Honors.

4 JUDGE SCHEINER: We can get started whenever you're ready.

5 MR. WARE: Okay. May it please the Board, my name is Charles

6 Ware and I represent the Applicant and the present application for this

7 appeal. The present application is drawn towards a particular feature of a

8 diaper, and, in particular, it's drawn to a cuff for the diaper. There are two

9 independent claims currently on appeal, Claims 1 and 15. And if I may, I'd

10 like to point out the elements at issue and then walk you through where

11 those elements are and how they relate to the cited prior art.

12 So I'm looking at independent Claim 1 and Figure 2 in the application

13 which shows the relevant elements. Independent Claim 1 has an elastically

14 contractible dual cuff, and if you look at Figure 2, Elements 40 and 50

15 comprise that dual cuff. Claim 1 continues having a proximate end and a

16 distal end, said dual cuff being joined to said article by a cuff bond. And

17 then continuing down Claim 1, said second cuff being disposed between said

18 cuff bond and said distal end, said dual cuff being constructed of a

19 continuous cuff material and enclosed by said cuff bond. The continuous

20 cuff material, if you look at Figure 2, is Element 33 which is that line that

21 wraps from the base down at the bottom up to the left and around the first

22 cuff, then down and over to the right and around the second cuff. The cuff

23 bond is Element 70 which is this hatched area down at the bottom of the

24 rectangular area that captures the ends of the continuous cuff material.

1 JUDGE ADAMS: How do you define what a cuff bond is? What is a
2 cuff bond?

3 MR. WARE: A cuff bond is a means of bonding the cuff together.
4 And I believe that the application speaks of it in broad terms as potentially
5 an adhesive or other means of securing.

6 JUDGE ADAMS: It has nothing to do with placement of these ends
7 on top of each other or away from each other as long as there's some
8 adhesive that sticks these, these ends, this distal end, to something else is a
9 cuff bond?

10 MR. WARE: Correct.

11 JUDGE ADAMS: Okay.

12 MR. WARE: The dual cuffs, again, are the 40 and 50 together, that
13 the cuff bond is a bond that's directed towards the cuff as a whole. Now, the
14 Examiner has cited portions of this St. Louis reference, U.S. Patent 5993433
15 against this element of Claim 1, a continuous cuff material enclosed by said
16 cuff bond. And if you look, in particular, the Examiner has cited Figure 6
17 from the St. Louis reference. And in particular, the Examiner points to
18 Element 172 in the St. Louis reference which is referred to as a gusset
19 attachment. Now, the Examiner, I believe, takes the position that the gusset
20 attachment is enclosing a cuff bond which I believe is the combination of --
21 actually, it's Element 176, I believe, which is on top and a little bit to the
22 right in Figure 6, the fabric layer. And we take the position that the St.
23 Louis reference does not, in fact, describe a continuous cuff material
24 enclosed by a cuff bond.
25

1 In the rejections quoted by the Examiner, the Examiner took several
2 positions with regard to this, first that a bonding is, in fact, an enclosure and
3 pointed to particular portions of the Applicant's specification where the
4 Examiner -- where the Applicant referred to a bond that enclosed/bonded the
5 cuff material. In fact, Your Honors, we believe that enclosed and bonded
6 are two separate functions and that the Applicant has not drawn an
7 equivalence between those two. And whether or not the gusset attachment,
8 172 in the St. Louis reference, bonds the fabric layer as shown in this Figure
9 6 does not bear on the fact -- does not bear on whether or not the gusset
10 attachment encloses the gusset flap member shown in Figure 6.

11 Now, having read through the specification of the St. Louis reference
12 several times, I have been unable to locate a specific reference that describes
13 172 as enclosing and sealing off -- closing off the gusset flap member. What
14 can we derive from Figure 6? Your Honor, if I were to describe Figure 6, I
15 would describe it as an exploded cross-sectional view. Unfortunately, the
16 St. Louis does not tell us what this is a cross section of, at what point along
17 the diaper are we seeing this cross section. So we're unable to say whether
18 this is the end or the middle or which particular cross-sectional slice we're
19 looking at. We're also not informed by the specification as to what is the
20 particular relationship of the elements in this exploded view. As I
21 understand it, an exploded view is intended to illustrate where the individual
22 pieces -- excuse me, what the individual pieces are and not particularly
23 where they are with respect to each other unless the specification provides
24 specific guidance on that point. Patent drawings are not supposed to be used
25 for providing particular dimensions or particular dimensional relationships

1 unless there is specific guidance in the specification on that point. And, in
2 fact, there's some --

3 JUDGE ADAMS: Before you start going down this exploded view
4 theory that you're characterizing this figure as, how does St. Louis
5 characterize this figure?

6 MR. WARE: They don't have a particular characterization --

7 JUDGE ADAMS: They don't, so column 3, lines 1, 2, 3, 4 which says
8 Figure 6 is a schematic, expanded, lateral cross-sectional view, that doesn't
9 mean anything to you? You're going to, you're going to extrapolate some,
10 some theory of exploded view of St. Louis based on your interpretation of
11 this figure without giving any benefit to how St. Louis would characterize
12 this figure?

13 MR. WARE: I would say that expanded and exploded are
14 synonymous, Your Honor.

15 JUDGE ADAMS: And you say you don't know where this, where
16 this figure is oriented on the actual device? It would say in this column 3,
17 lines 1 to 4 wherein the gusset flap barrier layer extends into the containment
18 flap section, so we know where it's oriented, is that correct?

19 MR. WARE: We know the particular section to
20 which -- in which it is oriented.

21 JUDGE ADAMS: So, we know it's a cross-sectional view of a
22 particular flap area that extends into the containment flap section, is that
23 right?

24 MR. WARE: Right, yes, Your Honor.

25

1 JUDGE ADAMS: Now, when you talk about there's a gusset and
2 you're, you're going down this path about what 172 is, maybe I
3 misunderstood you, but are you saying that St. Louis's material that starts,
4 for example, at 64, which is just above Element 172 and to the left?

5 MR. WARE: Yes.

6 JUDGE ADAMS: And goes upward towards -- to the left, wraps
7 around to the, to the right, and then tucks under and comes back towards
8 itself --

9 MR. WARE: Yes.

10 JUDGE ADAMS: -- to the left of Element 172, that that is somehow
11 different than your Element 33 in Figure 2?

12 MR. WARE: It's not the difference, Your Honor, between 64 and 33,
13 it's the difference between 172 in the St. Louis reference and Element 70 in
14 our current application.

15 JUDGE ADAMS: But I asked you at, at the beginning when you
16 were characterizing Figure 2 whether it was necessary for that material to
17 overlap itself or if it could be separate in some way and you said no, it
18 doesn't matter, is that right?

19 MR. WARE: I'm sorry, I don't remember. Which overlap are you
20 referring to?

21 JUDGE ADAMS: In your Figure 2 --

22 MR. WARE: Yes.

23 JUDGE ADAMS: -- the material, 33, would start and then extend all
24 the way in both directions and come back and overlap itself in that region 70
25 where you have some form of adhesive or other means, right?

1 MR. WARE: Overlapping is not a part of our claim.

2 JUDGE ADAMS: And I said it's not necessary, and you say correct.

3 MR. WARE: Yes.

4 JUDGE ADAMS: So in Figure 6 of St. Louis, it doesn't overlap so
5 that's consistent with your claim, is that right? This material section doesn't
6 overlap itself, 64 -- Element 64 and to the left of Element 172 of St. Louis,
7 that material is all the same material and it doesn't overlap. It comes
8 together, close together, but it doesn't overlap itself, right?

9 MR. WARE: Whether or not it overlaps is inapposite with respect to
10 the claim, Your Honor.

11 JUDGE ADAMS: Okay. In 172 of St. Louis, it seems to be binding
12 those two ends, is that right?

13 MR. WARE: I don't believe so, Your Honor.

14 JUDGE ADAMS: Okay, tell me why.

15 MR. WARE: Because it does not show particular contact between
16 those.

17 JUDGE GRIMES: But if the, if the gusset bond, 172, is securing that
18 full assembly to the underlying diaper, doesn't it need to secure both ends of
19 that, of that single cuff material?

20 MR. WARE: I don't think so, Your Honor, for several reasons. First
21 of all, there's Element 130 which I believe is a separate bond which could be
22 for the other half of that. Secondly, there is no -- as I understand it, there's
23 no particular teaching that states that requirement that the bond -- there's no
24 particular teaching in the St. Louis reference that has the requirement that
25

1 the bond, or the gusset attachment 172, secure both ends of that fabric layer,
2 176. It's simply not stated in the St. Louis reference.

3 JUDGE ADAMS: So what is a gusset attachment?

4 MR. WARE: I believe, Your Honor, that the St. Louis reference -- if I
5 can find a particular portion. If you look in the St. Louis reference at
6 column 6, lines 6 through 11, the St. Louis reference says and still other
7 aspects of the invention, each separate elasticizing gathered gusset flap,
8 9219, can be connected to at least one of the top sheets and the back sheet
9 layers with a gusset attachment, 172, which extends along each of the
10 appointed leg-opening regions. And so, Your Honor, I believe it's simply a
11 means for attachment.

12 JUDGE ADAMS: It's a means for attachment, what does it attach?

13 MR. WARE: I don't -- it seems, Your Honor, that --

14 JUDGE ADAMS: In, in the context of this Figure 6 that you've
15 directed our attention to, what is it attaching?

16 MR. WARE: From Figure 6, I don't believe it's clear, Your Honor.

17 JUDGE ADAMS: Okay, well, Figure 6 in the context of this
18 disclosure, what does it attach to? You said, you said 172 attaches
19 something, right? So tell me what it attaches?

20 MR. WARE: Your Honor, what I believe is that Figure 6 in the St.
21 Louis reference does not clearly describe that 172 encloses the gusset flap
22 member. And whether it attaches to 64 I don't believe is the issue with
23 respect to the claims, Your Honor --

24 JUDGE ADAMS: You think it attaches 170, 170, that left-hand end
25 of 170 there?

1 MR. WARE: No, I don't believe so, Your Honor. I don't believe
2 there's any --

3 JUDGE ADAMS: It only, it only attaches the right-hand side of
4 Element 64, is that right, in your mind?

5 MR. WARE: Well, whether it does, I, I'm not sure, Your Honor.
6 What I do believe is that 172 would need to attach to both sides of that
7 Element 64 or 176, the fabric layer, in order to enclose the gusset flap
8 member.

9 JUDGE ADAMS: I agree with that.

10 MR. WARE: And I don't believe that it -- that St. Louis reference
11 teaches that 172 bridges that gap and forms a completely closed off --

12 JUDGE ADAMS: It sure looks like it does from Figure 6. It seems
13 like it bridges that gap, doesn't it?

14 MR. WARE: I don't believe so, Your Honor.

15 JUDGE ADAMS: Okay.

16 MR. WARE: There's no particular contact between the two. I think
17 that -- Your Honor, I believe that 172 does not clearly teach that it bridges
18 that gap.

19 JUDGE SCHEINER: What about Figure 5 which only shows 172 and
20 not 130?

21 MR. WARE: Again, Your Honor, I -- it, it's not clear from what the
22 St. Louis reference discloses as to whether 172 discloses an attachment
23 simply to 64 or to both sides of the gusset flap member.

24 JUDGE GRIMES: In column 19 of St. Louis, it describes the gusset
25 perimeter bond, 130, and it describes it as optional. It says the invention can

1 include gusset perimeter bond 130 which attaches a terminal side edge of the
2 top sheet or back sheet select gusset sections. If that 130 bond is optional,
3 then in the absence of the bond, what is holding the right side of that gusset
4 material?

5 MR. WARE: I don't think the St. Louis reference provides a teaching
6 on that point, Your Honor. If you compare Figure 4, it also has a different
7 embodiment of the gusset attachments, 172 and 130. What I would say in
8 particular, Your Honors, is that the, the St. Louis reference provides a gusset
9 attachment, but it does not describe or teach an enclosure of a dual cuff
10 member by a cuff bond.

11 JUDGE ADAMS: So by enclosure, you just mean the two sides are
12 somehow connected with something?

13 MR. WARE: By enclosure -- yes, I mean completely closed off, Your
14 Honor.

15 JUDGE ADAMS: It doesn't mean that this thing has to wrap around
16 these little ends?

17 MR. WARE: Of the overlap, again, it's not included in the claims 1 or
18 15. Are there other questions on this point or may I proceed to my second
19 point?

20 JUDGE SCHEINER: Please, go ahead.

21 MR. WARE: In addition, Claims 1 and 15 also contain the element of
22 elastics. Claim 1 says wherein said first cuff envelopes at least one first
23 elastic, wherein said first elastic has a first and second end, wherein said first
24 elastic is secured to said first cuff near said first and second ends and, again,
25 Claim 1 goes on to repeat that element for a second elastic.

Turning again to Figure 2 of the application, we can see where the first, first elastic and the second elastic are. The first elastic is on the upper left-hand side, the first cuff, that's Element 42, and the second elastic is in the second cuff, it's Element 52. And looking at Claim 1, Your Honors, we can see a top, top plan view of the diaper which shows elastics 42 and 52 which are these elongated, cylindrical structures with ends terminating in the front and back halves of the diaper. Element 52 you see on the right-hand side is that rectangular shape which shows the overhead view of the cylindrical elastic member which has ends on the top and bottom. And then Element 42 another elastic noted beneath it, again, shown in a similar way with ends on the top and bottom.

Now, the Examiner again cited a portion of the St. Louis reference against the elastic material having ends secured -- elastic -- excuse me, an elastic secured near its first and second ends, and, again, relied on Figure 6 citing the elastomeric member 68 and 138, 68 being in your upper left corner and 138 being on the right-hand side. Which goes back to my point which I had explained previously is that while the St. Louis reference describes Figure 6 as a view in the containment section, the St. Louis reference does not describe whether the elastic, 68 and 138, are secured at their ends. We're not -- and, in fact, the specification is silent as to the extent of the bonding of the elastics.

JUDGE GRIMES: Would unsecured ends of elastic members have any function in an absorbent article?

MR. WARE: I'm not sure, Your Honor.

1 JUDGE GRIMES: Don't elastic members only stretch when they're
2 attached to something?

3 MR. WARE: Elastic members can be secured or they could be
4 captured in different manners. And so, I believe that there could be some
5 functionality for elastic members even though they are not securing a
6 particular portion of the diaper.

7 JUDGE GRIMES: Does St. Louis talk about means of securing the
8 members or -- as opposed to capturing them?

9 MR. WARE: The, the statement that I found that was most pertinent,
10 Your Honor, is in the St. Louis reference on column 23 and that's lines 52
11 through 55. It says alternatively, the elastomeric member, 68, can be
12 attached to at least one of the barrier and fabric layers which, if you, again,
13 refer to Figure 6 of the St. Louis reference, the fabric layer is 176 and the
14 barrier layer is 174. So back to the text, elastomeric members 68 can be
15 attached to at least one of the barrier and fabric layers with a plurality of
16 individual, longitudinally extending strips of adhesives. However, there is
17 no particular statement as to the extent of these strips of adhesive, no
18 particular statement with regard to the ends of the elastics, no particular
19 statement with regard to securing the ends of the elastics as recited in Claims
20 1 and 15.

21 JUDGE GRIMES: But there's also no particular statement as to a
22 reason not to secure the ends, is there?

23 MR. WARE: I don't believe there is a statement to that effect, Your
24 Honor.
25

1 JUDGE ADAMS: So, your position would be St. Louis just captures
2 these ends in some, in some manner, is that right?

3 MR. WARE: I don't know how St. Louis would capture the ends,
4 Your Honor. All I know --

5 JUDGE ADAMS: And somehow, you're, you're making a distinction
6 between secured and captured. I'm not sure that's a clear distinction.

7 MR. WARE: I think what I --

8 JUDGE ADAMS: I think as Judge Grimes explained, in order for this
9 thing to be stretchable or elastic, you have to have some, something holding
10 both ends, whether it's loosely holding it, perhaps captured loosely, or
11 secured tightly. It's still something has to hold so that you can stretch this
12 stuff, right?

13 MR. WARE: I don't believe --

14 JUDGE ADAMS: It just can't wiggle around because it wouldn't
15 stretch, is that right? And if it doesn't wiggle around, then it has to be, what,
16 secured?

17 MR. WARE: Your Honor, I don't believe the St. Louis reference
18 provides any teaching on those points.

19 JUDGE ADAMS: Okay. Would it be obvious to someone of
20 ordinary skill in the art?

21 MR. WARE: I don't believe so, Your Honor.

22 JUDGE ADAMS: Okay.

23 MR. WARE: Although the rejection today is a 102-B rejection. And
24 so, Your Honors, I don't believe that the St. Louis reference provides any
25 particular teaching that is pertinent to the elastics being secured at their ends.

1 Claims 1 and 15 have the identical elements on these points. And so
2 because the St. Louis reference doesn't provide a specific teaching with
3 regard to securing the elastics at their ends or specific teaching regarding
4 enclosing a continuous cuff material with a cuff bond, it is the applicant's
5 position that the St. Louis reference does not include each and every element
6 of the claimed invention. And, therefore, it does not anticipate the claims as
7 presented in independent Claim 1 and 15 and the dependent claims that
8 depend there from.

9 JUDGE ADAMS: Now, Claim 15 says where it's enclosed by a
10 single cuff bond, is that right?

11 MR. WARE: Correct.

12 JUDGE ADAMS: So, if I look back to Claim 1, it doesn't have to be
13 secured by a single cuff bond?

14 MR. WARE: Correct.

15 JUDGE ADAMS: So, you had two?

16 MR. WARE: Not necessarily, Your Honor.

17 JUDGE ADAMS: Not necessarily.

18 MR. WARE: So, there's a distinction, Your Honor, between enclosed
19 and secured. And in Claim 1 we have a continuous cuff material that's
20 enclosed by a cuff bond. However, it could be secured by more than one, it
21 could be --

22 JUDGE ADAMS: Two.

23 MR. WARE: Or three or more.

24 JUDGE ADAMS: Okay.

25 MR. WARE: Whereas, in Claim 15 --

1 JUDGE ADAMS: For example, for example, 172 and 130 of St.
2 Louis.

3 MR. WARE: That, that appears to be an attachment by more than one
4 bond, Your Honor.

5 JUDGE ADAMS: Like in Figure 4, 172 and 130?

6 MR. WARE: That appears to be the same, Your Honor.

7 JUDGE ADAMS: But that wouldn't enclose according to your claim?

8 MR. WARE: Correct, Your Honor. Are there any other additional
9 questions that I can address?

10 JUDGE SCHEINER: I don't have any.

11 MR. WARE: Thank you very much for you time. I appreciate your
12 preparation and your engagement.

13 (Whereupon, the hearing concluded on June 11, 2009.)
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